SUPREME

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 703

FRED MEYER, INC., a corporation, and FRED G. MEYER and EARLE A. CHILES, individually and as officers of said corporation, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD F. HOWREY
HAROLD F. BAKER
TERRENCE C. SHEEHY
1707 H Street, Northwest
Washington, D. C. 20006

GEORGE W. MEAD
1211 Public Service Building
Portland, Oregon

Attorneys for Petitioners

Of Counsel:

HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, Northwest
Washington, D. C. 20006

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FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Fred Meyer, Inc., a corporation, and Fred G. Meyer and Earle A. Chiles, individually and as officers of said corporation, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on July 1, 1966.

CITATIONS TO OPINIONS BELOW

The initial decision of the hearing examiner (R. 18-55)[1] and the opinion of the Federal Trade Commission (R. 59-147) are not officially reported. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, pp. 3a-32a, is reported at 359 F. 2d 351.

JURISDICTION

The opinion of the Court of Appeals (App. B, *infra*, pp. 3a-32a) was rendered on March 18, 1966. Rehearing was denied on June 8, 1966. The Court of Appeals' final judgment and decree (App. B, *infra*, pp. 33a-36a) was entered on July 1, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in holding that petitioner knowingly induced or received discriminations in price or promotional allowances, the Federal Trade Commission and the Court of Appeals disregarded and refused to follow the holding of this Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953), thereby placing buyers at their peril in seeking better prices, terms and conditions of sale and creating an open conflict between the Robinson-Patman Act and the broader antitrust policies of the Sherman Act.

2. Whether a broad, all-encompassing order may properly be entered in a case where the violations found involved a "unique" promotional scheme, were severely limited in number and extent, and the finding of violation was based upon admittedly weak and scanty evidence.

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[1] "R." refers to the record as printed for the use of the court below.

STATUTES INVOLVED

The statutory provisions involved are Sections 2(a), 2(d) and 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §§ 13 (a), 13(d), 13(f) (App. A, *infra*, pp. 1a-2a), and Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45 (App. A, *infra*, p. 2a).

STATEMENT

This petition seeks review of the judgment of the Court of Appeals for the Ninth Circuit which affirmed with modifications an order of the Federal Trade Commission directing petitioners to cease and desist from violating Section 2(f) of the amended Clayton Act and Section 5 of the Federal Trade Commission Act.

Corporate petitioner is an Oregon corporation which operates thirteen retail grocery supermarkets in the Portland, Oregon, area. The individual petitioners, Fred G. Meyer and Earle A. Chiles, are Chairman of the Board and President, respectively, of corporate petitioner.[2]

This is a so-called buyer case. In 1956, 1957 and 1958, during a four-week period beginning in September and ending in October, petitioner conducted a promotion called the "coupon book promotion" which consisted of the offering to consumers of special prices and terms of sale on certain featured products through the medium of coupon books. The coupon books, printed and distributed to consumers by petitioner, contained 72 coupon pages, each relating to a different

[2] Unless otherwise specified, the term "petitioner" herein refers to the corporate petitioner, Fred Meyer, Inc.

item. On redemption of these coupons, consumers received various benefits, such as free or sample items and reduced prices on multiple purchases.

To finance the coupon book promotions, petitioner invited participation of its suppliers; the participants received a page in the coupon book advertising the particular product chosen to be featured plus other advertising and promotional material. Suppliers participated under terms agreed upon prior to the promotion, including granting of allowances related to the volume of goods purchased by petitioner for resale during the promotion, payment of flat sum promotional allowances, and redemption of coupons submitted by consumers.

Count I of the Commission's complaint charged that petitioner violated Section 2(f) of the amended Clayton Act by knowingly inducing and receiving from its suppliers price discriminations prohibited by Section 2(a) of the Act. Count II of the complaint charged that petitioner violated Section 5 of the Federal Trade Commission Act by knowingly inducing and receiving from its suppliers discriminatory promotional payments prohibited by Section 2(d) of the amended Clayton Act.

Before the Court of Appeals petitioner argued, *inter alia,* that this Court's holding in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61 (1953), precluded a finding that petitioner knew or should have known the prices or promotional allowances it received were violative of either Section 2(a) or Section 2(d) because of the substantially different quantities purchased by petitioner vis-a-vis the competing retailers; because of the basic conflict such a

finding would create between the Robinson-Patman Act and the Sherman Act; and because such a finding would render the "knowingly" requirement a nullity, would place a practicably impossible burden on any buyer in the day-to-day conduct of business, and would fatally impair—to the ultimate detriment of consumers—the ability of buyers to seek and obtain better prices, terms and conditions of sale.

Nonetheless, uncritically following the Commission's lead, the Court of Appeals seemingly disregarded the broader policy considerations and held, in effect, that initiation of a program by a buyer automatically places it on notice that whatever concessions are forthcoming are unlawful and transfers to it the virtually insurmountable burden of proving a negative, *i.e.*, lack of knowledge of illegality.

Petitioner also argued before the Court of Appeals that because of the severe penalties imposed for violation of Federal Trade Commission orders, any order entered must be limited to the actual practice found unlawful. While the Court of Appeals did so restrict the Section 2(f) order, it inexplicably failed to do so on the Section 5 count and entered an all-encompassing, unrestricted Section 5 order.

REASONS FOR GRANTING THE WRIT

1. The application of the Robinson-Patman Act, particularly with respect to buyers, presents retailers and wholesalers with a most difficult, confusing and frustrating legal problem. Presumably, as this Court indicated in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61 (1953), there is still some room left in our regulated economy for bargaining between buyer and seller. Neither Congress nor this

Court meant, we are sure, to outlaw all haggling over price—a practice that has existed in the marketplace since long before the dawn of the Christian era. Indeed, this would be tantamount to attempting to outlaw basic human instinct.

However, the Federal Trade Commission and the court below in the instant case have, we believe, attempted this god-like feat, that is, to negate and destroy the human instinct to bargain over prices and allowances by placing on the buyer the burden of making sure that the seller does not give him too good a price.

This is a culmination of more than a decade of disregard by the Commission of the principles of *Automatic Canteen* which held that in a case against the buyer, the government has the burden of showing that the buyer knew that the seller could not justify the price differential under any statutory defense. The author of this petition is acutely aware of the fact that the Commission has barely paid lip service to these principles inasmuch as he briefed and argued *Automatic Canteen* before this Court some 13 years ago. Since certiorari was granted in that case, surely it should be granted here on the theory that *if* anyone is going to overrule the Supreme Court, it should be the Court itself and not the Federal Trade Commission.

In affirming the Commission's holding that petitioner knew or had reason to know that the concessions it received were unlawful, the court below relied on unsubstantial, weak and scanty evidence. It abdicated its conventional judicial function which is not blindly to accept the Commission's conclusions because of its allegedly superior expertise but rather to review the record as a whole and determine whether there is sub-

stantial evidence to support the agency finding. *Universal Camera Corporation* v. *National Labor Relations Board,* 340 U.S. 474 (1951).

The court below, while admitting that the quantity differences between petitioner's purchases for the four-week coupon promotion and those of the allegedly unfavored customers were "indeed large" (App. B, *infra,* p. 20a), refused to disturb the Commission's finding that petitioner knew the differentials could not be cost justified, relying on the tenuous grounds that the suppliers involved did not regularly grant quantity discounts, that petitioner paid the going price during the other eleven months of the year, that the allowances were solicited and that the concessions from two of the suppliers were large (*Id.* at 20a-21a). The Court of Appeals apologized for its conclusion in this respect by saying, "In summary, we consider that the evidence which supports the Commission's finding that Meyer had reason to believe that the discriminatory terms and prices it received were not cost-justified is weak but not insufficient" (*Id.* at 22a).

In connection with the defense of lack of competitive injury, the Court of Appeals affirmed the Commission's finding, without any reference whatsoever to the evidence (*Id.* at 23a), notwithstanding the fact that the Commission had held in a companion case that the nature of the concessions received by petitioner for the coupon promotions was not such as to create a reasonable probability of substantial injury to competition. See *Cannon Mills Company,* CCH Trade Reg. Rep., 1963-65 Transfer Binder, ¶16,878.

The evidence in this case was limited to transactions between petitioner and five suppliers—Burlington In-

dustries, Inc., Cannon Mills Company, Tri-Valley Packing Association, Idaho Canning Company and Philip Morris Company. The Court of Appeals held that petitioner's transactions with Tri-Valley and Idaho Canning were not illegal under Section 2(d) of the Clayton Act because there was no showing that petitioner and the allegedly disfavored customers (wholesalers) competed at the same functional level; that 2(d) did not require the sellers to offer proportionately equal benefits to wholesalers who were not in competition with petitioner. For the same reason, the transactions between petitioner and Philip Morris, insofar as they concerned United Grocers, a wholesaler, cannot be considered illegal (see App. B, *infra*, p. 15a, n. 11).

While the court's opinion did not discuss this functional level issue in connection with the Sections 2(a)-2(f) charge, the same reasoning necessarily applies since there was no showing that the retailers served by the unfavored wholesalers were "indirect" customers of Tri-Valley or Idaho Canning,[3] or that they competed with petitioner in the sale of products purchased from such wholesalers. While 2(a) does not in terms require that the favored and unfavored customers be in competition, it has long been the rule that in order to establish competitive injury there must be competition either between sellers in "first line" cases or between buyers in "secondary line" cases. In a "secondary line" case, such as this, "[s]ome competitive nexus between customers receiving the higher and the lower prices is a basic predicate of any conclusion of adverse effects at the customer level attributable to

[3] The complaint did not charge a 2(a) violation involving Philip Morris.

a seller's price differentials." Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), p. 173. "If particular customer classes do not compete in their resale operations, the supplier's price differentials between them cannot impair competition with the recipient of the lower price" (*Id.* at 176).[4]

The transactions between petitioner and Cannon Mills cannot be considered illegal under either 2(a) or 2(d) because the hearing examiner, in a companion case against Cannon, held that the discount to petitioner—the identical discount challenged here—was fully cost justified (*Cannon Mills Company*, Initial Decision, CCH Trade Reg. Rep., 1963-65 Transfer Binder, ¶16,682), and the Commission later dismissed the complaint on the ground there was no injury to competition. *Cannon Mills Company*, CCH Trade Reg. Rep., 1963-65 Transfer Binder, ¶16,878.[5]

In view of the foregoing, the concessions which petitioner received from Tri-Valley, Idaho Canning and

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[4] See *Chicago Sugar Company* v. *American Sugar Refining Company*, 176 F. 2d 1, 10 (7th Cir. 1949); *Secatore's Inc.* v. *Esso Standard Oil Company*, 171 F. Supp. 665, 667-68 (D. Mass. 1959); and *Sano Petroleum Corp.* v. *American Oil Company*, 187 F. Supp. 345 (E.D.N.Y. 1960).

[5] The Commission, on page 75 of its brief before the Court of Appeals, after referring to the fact that the Commission had dismissed the complaint against Cannon Mills, says:

> Accordingly, while we rely upon Cannon Mills' discriminations as constituting violations of section 2(d), . . . we do not rely upon its price discriminations as constituting violations of section 2(a), or upon their inducement and receipt by petitioners as constituting violations of section 2(f).

Since the Commission dismissed the complaint on the ground of lack of injury to competition, we think it equally clear that it cannot rely on the Cannon Mills transaction to support the 2(d) charge.

Cannon Mills, and a portion of those received from Philip Morris, cannot form any basis for the Court of Appeals' decision that petitioner knew or had reason to know that said concessions were unlawful.

If the foregoing analysis is correct, and we believe it is beyond dispute, the court's finding that petitioner knew or had reason to know that the concessions it induced were unlawful must have been based solely on petitioner's transactions with Burlington Industries in connection with the 2(a) charge, and solely on transactions with Burlington and Philip Morris in connection with the 2(d) charge. In other words, the evidential score, at the very least, was 85 percent in petitioner's favor on the 2(a) charge and 70 percent in its favor on the 2(d) charge.[6]

Based on such a score card we do not think it right or proper for a court to infer knowledge of illegality, particularly when the remaining evidence was admittedly "weak" and "scanty" (See App. B, *infra,* pp. 13a, 14a, 22a).

In 1958, during the coupon promotion period, petitioner purchased from Burlington Industries in much greater quantities than the disfavored customer—4308 dozen hose versus 354 dozen, with a price differential of less than ten percent (CX 156, 158A-168B, 190-197)—yet the court below, relying on inferences and openly acknowledging that the Commission introduced no cost information or studies, held that petitioner had reason to believe that the supplier could have no cost justification defense. This holding, we

[6] On the 2(a) charge only one allegedly unfavored customer out of seven was left for consideration and under the 2(d) charge only two such customers out of seven were left for consideration.

suggest, is in conflict with the facts and with *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61 (1953).

With reference to the 2(d) charge involving Philip Morris, the court below observed that "[t]he evidence before the Commission on this point is indeed scanty" (App. B, *infra,* p. 13a).

This case, one of the most important that has ever confronted the food industry, where the government has the burden of proof, should not, we respectfully submit, be decided on "weak" and "scanty" evidence.

We do not see how it was possible for the Court of Appeals to disregard the *Cannon Mills* case, *supra.* Based on an elaborate cost study, which is discussed at length in his opinion, the hearing examiner found that the cost savings to Cannon arising from petitioner's larger quantity purchase was 12.135¢ per dozen while the discount was only 10¢ per dozen. Certainly, in the light of this affirmative finding of cost justification the court should not have inferred that petitioner *knew* or *should have known* that similar transactions with other suppliers, involving similar differences in quantities, could not be cost justified.

In view of the foregoing, the practical effect and meaning of the holdings of the Commission and the Court of Appeals is that initiation by a buyer of a program involving supplier participation automatically places the buyer on notice that whatever concessions or allowances are forthcoming are unlawful and transfers to it the practicably impossible burden of establishing a negative, *i.e.,* that the buyer lacked knowledge of illegality. Such a holding is in clear conflict with the spirit and the letter of *Automatic Canteen.*

While the Court of Appeals "buttressed" its opinion by quoting isolated phrases from *Automatic Canteen,* we are certain that a reading of the Supreme Court's decision in full text will demonstrate that the decision here is in conflict with the purpose and intent of the Supreme Court's holding, namely, that the Robinson-Patman Act should not be interpreted as "putting the buyer at his peril whenever he engages in price bargaining," that "[s]uch a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated" (346 U.S. at 73-74).

To paraphrase the Supreme Court in *Automatic Canteen,* if this decision against petitioner stands, it would render the "knowingly" requirement of the statute meaningless (*Id.* at 71), would comprehend any buyer who engages in bargaining with the seller (*Id.* at 72), and would put the Robinson-Patman Act in direct conflict with the broader antitrust policies of the Sherman Act (*Id.* at 74).

2. After finding violations of Section 2(f) and Section 5 as charged, the Commission entered an order which bore no reasonable relationship to the practice found unlawful; the order directed petitioner to cease and desist from knowingly inducing or receiving *any* discrimination in prices or promotional payments. Noting that under what is sometimes called the Clayton Finality Act, 73 Stat. 243 (1959), 15 U.S.C. § 21, the Commission's order, when it becomes final, subjects petitioners to a $5,000 penalty for each violation and, when the violation is continuing, to a $5,000 per day penalty while it continues, the Court of Appeals stated: "This, we think, requires that Commission orders be

more carefully framed than formerly, and that they no longer be a mere command to obey the statute" (App. B, *infra*, p. 30a), citing, *inter alia, Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 367-68 (1962), and *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F. 2d 833, 837-38 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962).

Because the Commission's order amounted to nothing more than a broad command to obey the statute and was not properly related or limited to the practice found unlawful, the Court of Appeals found the order "subject to many of the strictures leveled by the courts at the orders involved in the foregoing cases" (App. B, *infra*, p. 32a), and directed modification of the order to embrace only the "scheme" found unlawful or "comparable ones" (App. B, *infra*, p. 32a).

As enforced by the Court of Appeals, the Section 2(f) part of the order prohibiting inducement and receipt of discriminatory prices, consistent with the court's opinion, is restricted to the knowing inducement or receipt of discriminatory prices "in connection with any promotional scheme consisting of distribution of coupons to and return of coupons by consumers in connection with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable scheme . . ." (App. B, *infra*, p. 34a). That portion of the order dealing with the Section 5 charge, *i.e.*, inducement or receipt of promotional allowances, however, wholly inconsistent with the court's opinion, prohibits the knowing inducement or receipt of promotional payments "in connection with any promotional scheme consisting of distribution of coupons to and return of coupons by consumers in connection

with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable program, *or in connection with any actual or purported promotion or special sale of particular products to be conducted by or on behalf of respondent Fred Meyer, Inc.* . . ." (App. B, *infra*, p. 35a; emphasis added).

Thus, despite its conclusion that under this Court's holding in *Federal Trade Commission* v. *Henry Broch & Co., supra*, as well as under lower court holdings, the Commission's order was unduly broad and should be limited to the scheme found unlawful or to comparable ones, and despite the fact that it so limited the Section 2(f) order, the court below entered and enforced an order under the Section 5 charge which applies, in the broadest possible terms, to any scheme or practice which might conceivably fall within the prohibition of the statutory terms as interpreted by the Commission. Petitioner seeks review of the judgment of the court below enforcing the Section 5 portion of the order.

The express reason that the Court of Appeals modified the Section 2(f) order applies with equal force to the Section 5 order. Under Section 5, subsection (1), of the Federal Trade Commission Act, 15 U.S.C. § 45 (*l*), petitioners are subjected to a $5,000 penalty for each violation and to a $5,000 per day penalty for a continuing violation. The finding of a Section 5 violation by both the Commission and the Court of Appeals was based upon essentially the same transactions as the Section 2(f) violation and both involved the same "unique" promotional scheme. Moreover, its finding of violation, the Court of Appeals repeatedly acknowledged, was based upon "weak" and "scanty" evidence

(See App. B, *infra*, pp. 13a, 14a, 22a). And, as pointed out above, the finding of violation by petitioner was based upon a finding of violation by only two suppliers and a single customer of each of those suppliers.

In light of this, it cannot be disputed that the violations by petitioner were not extensive or flagrant. Under such circumstances, this Court has indicated, a broad, all-encompassing order, is improper. See *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392-93 (1959). See also *Tri-Valley Packing Association* v. *Federal Trade Commission*, 329 F. 2d 694, 709 (9th Cir. 1964).

Because of the nature of the violation charged in the instant case—a buyer case—the above considerations and principles are especially applicable. It is not only impracticable but virtually impossible for any buyer to obtain the detailed "knowledge" which would be required of it, under the Commission's and the Court of Appeals' interpretation, to assure that allowances it has received are lawful. At a minimum, the buyer would be required to determine specifically what other customers a particular supplier serves, what products are sold to that customer and whether that customer is a "competing" customer within the meaning of the statute. Additionally, the buyer would be required to determine exactly what allowances were being offered or granted to those "competing" customers, the time period during which they are being offered or granted and whether such allowances are "proportional". Apart from the potential Sherman Act problems presented by a buyer engaging in activity necessary to determine these specifics, the burden imposed would be harsh and virtually impossible to meet. If any order is proper, therefore, it must be limited to the practice actually found unlawful.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD F. HOWREY
HAROLD F. BAKER
TERRENCE C. SHEEHY
1707 H Street, Northwest
Washington, D. C. 20006

GEORGE W. MEAD
1211 Public Service Building
Portland, Oregon

Attorneys for Petitioners

Of Counsel:

HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, Northwest
Washington, D. C. 20006

October 1966.

APPENDIX A

Statutes Involved

(1) Section 2(a) of the Clayton Act, as amended, (49 Stat. 1526; 15 U.S.C. § 13(a)):

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . .

* * *

(2) Section 2(d) of the Clayton Act, as amended, (49 Stat. 1526; 15 U.S.C. § 13(d)):

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with

the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(3) Section 2(f) of the Clayton Act, as amended, (49 Stat. 1526; 15 U.S.C. § 13(f)):

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

(4) Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. § 45):

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are declared unlawful.

* * *

APPENDIX B

Opinion and Judgment Below

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,903

FRED MEYER, INC., et al., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

[March 18, 1966]

Petition to Review an Order of the
Federal Trade Commission

Before: JERTBERG, and DUNIWAY, Circuit Judges and FOLEY, JR., District Judge

DUNIWAY, Circuit Judge:

This is a petition to review and set aside an order of the Federal Trade Commission which directs that petitioners, Fred Meyer, Inc. and two of its officers, all of whom we refer to as Meyer, cease and desist from conduct in alleged violation of section 2(f) of the Clayton Act, 15 U.S.C. § 13(f), and section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

These, as found by the Commission, are the facts. Fred Meyer, Inc., an Oregon corporation operates a chain of thirteen retail supermarkets in Portland, Oregon, and the immediate vicinity, in which it sells grocery products, drugs, variety items, and a limited line of clothing. Its sales in 1957 exceeded $40 million, making it, during the relevant period, the second largest seller of all goods in the area. In 1960 it made one-fourth of all retail food sales in the Portland area, by its own claim selling to "75% of Oregon's population" through its supermarkets located "in every neighborhood."

In about 1936 petitioner commenced an annual promotion, called the "coupon book promotion," beginning in September and ending four weeks later. The mechanics of the coupon book are simple. Meyer prints a book, usually containing 72 pages, each page of which features a single product. These pages are the "coupons" and each entitles the customer to the specially reduced price there stated. The customer buys the book for the nominal sum of ten cents and must surrender the appropriate coupon when making his purchase of goods. It is a successful promotion: Meyer sold 138,700 books in 1957 and 121,270 in 1958.

The cost of the books and related advertising expenditures[1] was met only in part by revenue from their sale; the rest was supplied, in amounts approximating *total* costs, by participating suppliers who usually paid, at the very least, a flat rate of $350 per coupon page. These payments were made sometimes in cash, sometimes in price discounts on goods purchased for resale during the promotion, and sometimes by replacement of a predetermined portion of the goods so sold. Some of the suppliers further underwrote the promotion by granting volume-based reductions, replacing goods sold, or redeeming coupons in cash at an agreed rate. Certain of these, as well as other unrelated promotional payments which constitute part of the subject matter of the complaint, are detailed in Part I of this opinion.

As a consequence of the solicitation and receipt of these payments, the Commission issued a two-count complaint against petitioners. Count I, based on the coupon book promotion, charged a violation of section 2(f) of the Clayton Act by inducing and receiving "discriminatory prices, discounts, allowances, rebates and terms and conditions of sale" which they knew or should have known were

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[1] Total promotional expenditures of this type amounted to $23,406, or about 17 cents per book, in 1957, and not dissimilar amounts in the other years involved.

granted in violation of section 2(a) of that Act. Count II charged a violation of section 5 of the Federal Trade Commission Act by the inducement of promotional aid, of the type forbidden by section 2(d) of the Clayton Act, with reference to both the coupon book promotion and other, unrelated promotions. These statutes are set out in pertinent part in the margin.[2]

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[2] Clayton Act § 2, as amended by Robinson-Patman Act, 15 U.S.C. § 13:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:"

"(d) It shall be unlawful for any person . . . to pay or contract for the payment of anything of value to or for the benefit of a customer of such person . . . as compensation or on consideration for any services or facilities furnished by or through such customer in connection with the . . . sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

"(f) It shall be unlawful for any person . . . knowingly to induce or receive a discrimination in price which is prohibited by this section." (References to "commerce" omitted)

Federal Trade Commission Act § 5, 15 U.S.C. § 45:

"(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful . . . ."

The Hearing Examiner's decision found the violations as charged. The Commission affirmed and issued the cease and desist order which, exceptions to it having been rejected, is now here for review.

Meyer raises six basic questions here, and levels a broadside attack on the sufficiency of the evidence to sustain the Commission's findings. Those questions are (1) whether the supplier payments here are cognizable at all under section 2(a), (2) whether section 2(d) requires suppliers to refrain from discriminating among customers who occupy different functional levels or varying combinations of functional levels, (3) whether Meyer knew or had reason to know of the unlawfulness of the payments it induced, (4) whether inducement of disproportionate promotional payments is cognizable under section 5 of the Federal Trade Commission Act, and (5) whether the Commission's cease and desist order was improperly directed to the corporation's officers as individuals, or (6) was improper for failure to reasonably relate to the practices found to be unlawful.

I. The Evidence.

Complaint counsel chose transactions with five suppliers—Burlington Industries, Inc., Cannon Mills Company, Tri-Valley Packing Association, Idaho Canning Company, and Phillip Morris, Inc.—during 1956, 1957, and 1958, to ground the complaint. Meyer asserts, with respect to each supplier, that the proof is vitally insufficient to support the findings. We examine the transactions seriatim, stating the facts as the Commission found them.

A. *Burlington Industries, Inc.*

Burlington participated in the 1957 and 1958 coupon book promotions, agreeing in the spring of each year to reduce its prices to Meyer by, respectively, 50-94 cents and 75 cents per dozen pairs of nylon hose. The disfavored customer, Lipman, Wolfe & Co., a Portland retail depart-

ment store, received no discount on its contemporaneous purchases.

Meyer argues first that since these purchases were arranged at times separated by substantial intervals, though completed by contemporaneous purchase orders and deliveries, there cannot be that comparability which the statute demands as a basis for a finding of discrimination and injury to competition. The Commission responds that the Act contemplates competition in distribution, which it found to exist, and that the time of purchase by different customers is only evidence bearing on the existence of that competition. Its contention finds support in *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 5 Cir., 1962, 307 F.2d 916, 921. A substantial time interval indicates only that different prices might have been caused by different market conditions, rather than by an accomplished intent to discriminate. Here the record indicates that market conditions had not changed materially.[3] Such a determination is more properly for the Commission than for the courts. See *Universal Camera Corp.* v. *NLRB*, 1951, 340 U.S. 474, 488; *Carter Prods., Inc.* v. *FTC*, 9 Cir., 1959, 268 F.2d 461, 492, *cert. denied*, 1959, 361 U.S. 884. We cannot say that the determination here is not supported by substantial evidence; it is, therefore, conclusive, 15 U.S.C. §§ 21(c), 45(c); see *Universal Camera, supra; cf.* 5 U.S.C. 1009(e) [Administrative Procedure Act § 10(e)(B)(5).] *Atalanta Trading Corp.* v. *FTC*, 2 Cir., 1958, 258 F.2d 365, cited by Meyer, is not contrary. There isolated and nonrecurring sales of particular products had been made, without allowances, to competitors of the allegedly favored customer several months before and after the sales to the favored customer. The court, contrary to the Commis-

[3] The Commission has, in fact, found sales to two competitors three and a half months apart sufficiently comparable on "a showing of continuous sales of regularly promoted items," *Joseph A. Kaplan & Sons, Inc.*, 1963, FTC Dkt. 7813, CCH Trade Reg. Rep. ¶ 16,666.

sion's construction of the law, held that these facts standing alone could not establish a prima facie case of discrimination because such a rule would force a supplier to elect to give promotional allowances at the time of the first sale of a product or not at all, a result which would "stifle rather than encourage competition and have the practical effect of outlawing all promotional allowances." *Id.* at 371. But here the sales are of a single, fairly standardized item, widely sold in the area, and recur frequently during the years involved. Hence *Atalanta* is not controlling.

Meyer next contends that the evidence fails to show that the hosiery purchased by it and by Lipman, Wolfe was of "like grade and quality," (15 U.S.C. § 13(a), *Atalanta Trading Corp.* v. *FTC*, 2 Cir., 1958, 258 F.2d 365, 369-70) asserting that the fact that it had entered additional specifications on its purchase orders compels the conclusion that a different grade and quality resulted. However, the record fails to show that these changes, if in fact made, produced any difference in the marketability, appearance, durability, cost or manner of manufacture, or other indicia of "grade and quality" of the goods. Moreover, in Burlington's invoices to both customers the hose are identified by identical style numbers. This, we think, is sufficient to permit the inference that the goods themselves were identical. *Cf. Central Paper Co.* v. *Southwick*, 6 Cir., 1932, 56 F.2d 593, 597-98; *Straus* v. *Victor Talking Machine Co.*, 2 Cir., 1924, 297 Fed. 791, 804-05; see also *United States* v. *Bryan*, 1950, 339 U.S. 323, 332. That each customer specified and received private label packaging does not, without more—and "more" is lacking here—change that conclusion. See *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 5 Cir., 1962, 307 F.2d 916, 923.[4]

[4] The Commission has long held that brand differences alone do not necessarily compel the conclusion that the products are not of "like grade and quality" and that brand identity may overcome insignificant physical differences in the goods or their containers, see Rowe, Price Discrimination Under the Robinson-Patman Act 69-73 (1962, Supp. 1964) and cases cited there.

Finally, Meyer makes much of the disparity in quantities purchased by it and by Lipman, Wolfe & Co., asserting that by reason of such disparity a presumption of cost justification arises which complaint counsel should but failed to rebut. Such arguments are properly addressed to the proposition that Meyer had no knowledge or reason to know that the allowances it received were discriminatory, and so we relegate consideration of them to that portion of this opinion.

B. Cannon Mills Company.

Cannon Mills is said to have violated sections 2(a)[5] and 2(d) of the Act by granting, at Meyer's instance, a 10 cents per dozen allowance on fingertip towels sold during the 1956 promotion. These towels, regularly sold at retail for 23 cents each, were advertised for sale at 7 for $1.00. Meyer purchased 2,000 dozen in March and another 5,500 dozen in October of 1956, while Roberts Brothers, the Portland retail department store allegedly discriminated against, purchased a total of 600 dozen (bearing the same style number as those purchased by Meyer) in April, June, and November of that year.

Meyer again claims that identity of style numbers on billing invoices is insufficient proof of likeness of grade and quality. For the reasons already set out, we disagree. The Commission was justified in concluding that the towels were identical.

A somewhat more substantial question is raised by the claim that the record fails to show simultaniety of stocking, handling, or resale of the towels, hence the required

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[5] A subsequent proceeding against Cannon Mills, *Cannon Mills Co.*, FTC Dkt. 7494, 3 CCH Trade Reg. Rep. ¶ 16,878 (1964), resulted in dismissal of the complaint because competitive injury had not been shown. The Commission therefore here refrains from relying on these alleged violations insofar as the section 2(a) charge is concerned.

competition has not been proved. But again we think that the Commission, more expert than we in the mechanics of retail merchandising, could and did reasonably conclude that such competition existed. A knowledgeable witness, in fact, so testified, and we have previously held substantially identical evidence sufficient to uphold a similar finding, *Tri-Valley Packing Ass'n* v. *FTC,* 9 Cir., 1964, 329 F.2d 694, 701.

C. *Tri-Valley Packing Association.*[6]

The Commission's case here is that Meyer purchased, for the 1957 coupon book promotion, 2,200 cases of its private label "My-Te-Fine" fancy grade sliced and halved peaches from Tri-Valley, concededly at the same time that Hudson House, a disfavored wholesaler, purchased 175 cases of identically described merchandise under its own private label from the same source. Tri-Valley agreed to pay Meyer $350 (in merchandise or cash, at its option) for a coupon page and to redeem, in merchandise, every third can sold on the coupon's "Buy two cans and get one free" offer. No such offer was made or made available on proportionally equal terms to Hudson House.

Meyer again founds its attack on the proposition that "like grade and quality" were not sufficiently proved, pointing to evidence in the record tending to show that the quality of peaches sold under the general classification of "fancy" varies according to where, when, and by whom the peaches were grown and packed.

But a Portland retailer witness specifically testified that he competed directly, in peaches of the grade and quality purchased from Hudson House, with a nearby Meyer store. And the fact that the goods were identically described on the supplier's invoices to Meyer and to Hudson House

[6] We have previously considered Tri-Valley's participation in Meyer's 1957 coupon book promotion, see *Tri-Valley Packing Ass'n* v. *FTC,* 9 Cir., 1964, 329 F. 2d 694, 707-10.

sufficiently establishes commercial identity or commercial fungibility, which is all that the Robinson-Patman Act demands.[7] To require the level of proof for which Meyer contends would be to require the impossible.

Meyer further argues that the proof is insufficient because it is not shown that these Tri-Valley peaches made their way to customers of Hudson House. We agree. *Tri-Valley Packing Ass'n, supra,* at 708-11, made it clear that competition at the same functional level must be shown. Here, Meyer, an integrated operation, and Hudson House, a wholesaler, do not compete at the same functional level, hence Tri-Valley goods must be directly traced to Hudson's customers to show that Tri-Valley has dealt "directly" with them, that they are "indirect customers" of Tri-Valley and therefore in competition with Meyer in the sale of comparable goods. *Ibid.*[8] That has not been shown. In consequence, the proof must be held insufficient as to a 2(d)-2(f) charge involving Tri-Valley. Whether it is insufficient support for a 2(a)-2(f) charge or for a Federal Trade Commission Act § 5 charge is considered later in this opinion.

D. *Idaho Canning Company.*

Meyer does not, as it cannot, dispute the sufficiency of proof of simultaniety of sale and comparability of grade

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[7] *Cf. Bruce's Juices, Inc.*, v. *American Can Co.*, S.D. Fla., 1949, 87 F. Supp. 985, 987, *aff'd*, 5 Cir., 1951, 187 F. 2d 919, 924. See also *Moog Indus., Inc.* v. *FTC*, 8 Cir., 1956, 238 F. 2d 43, 49-50, *aff'd*, 1958, 355 U.S. 411.

"The 'like grade and quality' concept . . . was designed to serve as one of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute." Report of the Attorney General's National Committee to Study the Antitrust Laws 157-58 (1955).

[8] See Rowe, Price Discrimination Under the Robinson-Patman Act, § 13.11 at pp. 398-99 (1962, Supp. 1964) and cases there cited.

and quality of canned corn sold to Meyer and to Hudson House and Wadhams & Co., the nonfavored wholesaler purchasers. Idaho Canning's participation in Meyer's 1957 coupon book promotion consisted of payment in merchandise of $350 for a coupon book page and redemption in free goods of coupons received by Meyer offering one free can of corn for every two purchased, a transaction substantially identical with that of Tri-Valley. Idaho's participation was solicited by Meyer, and it made no comparable offer to Hudson House or Wadhams & Co.

Equally here, the proof is vitally insufficient to support a 2(d)-2(f) charge in that the goods were traced only to the wholesaler. Robinson-Patman doctrine has not yet progressed to a point which allows the Commission to infer an "indirect customer" relationship from the mere fact that goods were supplied to a middleman, at least where those goods became inextricably mixed with other, identical goods purchased from other suppliers before their resale to retailers. No more than that has been proved here.

E. *Phillip Morris, Inc.*

The complaint charges violations involving Phillip Morris of § 2(d) and of § 5 of the Federal Trade Commission Act, but not of § 2(a). These alleged violations were the solicitation and receipt by Meyer of (1) a $500 payment for participation in Meyer's 1956 "Gift Days" promotion; (2) a $400 payment on April 26, 1957 in connection with Meyer's 1957 "Thrift Days" promotion; (3) a payment of $800 (received on October 24, 1956) for Meyer's promotion of Parliament cigarettes during September, 1956; and (4) payment of $150 per month during most of 1956 for promotion of Phillip Morris tobacco products. Meyer does not contend that the payments were not made. It does say, however, that mere proof of payments is insufficient proof of a § 2(d) violation in the absence of a showing

that proportionally equal payments were not made to competitors.

The evidence before the Commission on this point is indeed scanty. Meyer's tobacco buyer testified that she had initiated the negotiations leading, upon submission of bills to Phillip Morris, to receipt of these payments. A Phillip Morris representative characterized these payments, by implication, as "special deals." He testified that these "special deals" were not offered to his company's customers as a matter of course nor publicized in any way, and that he could not recall offering similar proposals to customers other than Meyer. The general manager of Oregon Piggly Wiggly Company, an allegedly disfavored Portland retailer, testified that that organization had received no promotional allowances from Phillip Morris in or for promotional activities during September, 1956 and that the only payment received[9] during the months of March through May of 1957 was a $357.75 contribution toward the cost of soft drinks given away on the sale of cigarettes. Testimony of personnel of United Grocers, the other Portland purchaser allegedly discriminated against, was to the general effect that that organization had received no promotional allowances during 1956 and 1957 other than the tobacco industry's normal promotional payments adverted to in note 9, *supra*.

On the basis of this evidence, the Commission concluded that the payments received by Meyer were *in addition to* "regular" promotional payments, that they were not made proportionally available to other, competing retailers of the same goods, and moreover, that they were "virtually incapable of being offered on proportionally equal terms."

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[9] We do not concern ourselves here with the regularly-advertised, volume-based promotional allowances which both parties concede were made proportionally available.

We cannot say that that conclusion was erroneous as a matter of fact.[10]

This instance merely points out two factors common to Commission proceedings and to our review of them. First, those witnesses in possession of the most enlightening evidence are usually representatives of respondents or potential respondents, who have an interest in revealing only what they must and in volunteering nothing. Second, application of the Commission's reserve of expertise to this sometimes painfully extracted testimony may produce conclusions, and valid conclusions, quite different from those which an uninitiated fact-finder might reach. And, of course, the Commission and its Hearing Examiner are closer to the facts than we are, and we cannot discount the justifiable effect which weak and evasive responses, apparent even on the face of this cold record, may have had on them. It is worth noting, for example, that while the Commission set aside many of the conclusions of the Examiner here, it is agreed with him that the Phillip Morris payments were not offered to other purchasers on a proportionally equal basis; both opinions relied heavily, perhaps primarily, on the testimony of Phillip Morris' representative, who nowhere testified affirmatively to such a state of facts. In sum, the evidence is weak but not insufficient.

Meyer, however, attacks on other grounds, claiming that the Commission erred in classifying United Grocers as a retailer rather than a wholesaler. If this is true, then it and Meyer compete at different functional levels and, ac-

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[10] "A course of conduct under which a seller fails to inform respecting such compensation or make known his terms or otherwise to offer them to one customer while granting payment for services to his rival reseller essentially represents concealment. In such case, the credit or allowance is not 'available' to the unfavored competitor, for all practical purposes a withholding and denial of opportunity to share occur, and the law is violated." *Kay Windsor Frocks, Inc.*, 1954, 51 F.T.C. 89, 95. *Cf. Vanity Fair Paper Mills, Inc.* v. *FTC*, 2 Cir., 1962, 311 F. 2d 480, 484-86.

cording to petitioner, therefore there is no obligation on Phillip Morris (under *Tri-Valley Packing Ass'n, supra*) to offer it proportionally equal promotional benefits.

There is a broad gamut of possible organization of functions, and in that range a buying cooperative such as United Grocers may function as an agent of each retailer-member, as a wholesaler, or as something between those extremes. We think that, within limits, classification here is in the province of the finder of fact. While we have some difficulty accepting the Commission's conclusion that United Grocers is "plainly" a retailer,[11] we find it unnecessary to decide the question ourselves since we uphold the Commission's finding of discrimination against Oregon Piggly Wiggly Company, concededly in functional competition with petitioner.

The question of law which accompanies the foregoing factual determination, whether a 2(d) violation may exist where the favored and nonfavored customer inhabit different functional levels, was settled in Meyer's favor in *Tri-Valley Packing Ass'n* v. *FTC, supra.*

II. Are the Payments Received From Suppliers in Connection With the Coupon Book Promotions Cognizable Under Sections 2(a) and 2(f) of the Clayton Act?

Meyer tenders, as the first of two "threshold questions," the proposition that no part of the payments here made by Burlington Industries, Tri-Valley, and Idaho Canning can be held violative of section 2(a) of the Clayton Act. This conclusion, it says, is compelled by the facts that "(1) the coupon book promotion was an institutional promotion

[11] The organization and operation of United Grocers, as reflected in this record, seems quite similar to that of Central Grocers, Inc., a quasi-cooperative owned by its retailer-members, which we treated as a wholesaler in *Tri-Valley Packing Ass'n* v. *FTC, supra,* at 706-10.

involving a combination of advertising and promotional services furnished by or through Fred Meyer 'in connection with the processing, handling, sale or offering for sale' of the individual supplier's products, and (2) the payment of each supplier was made pursuant to agreement with Fred Meyer which contemplated, and was tied directly to, the furnishing of promotional services and facilities by Fred Meyer in connection with the resale of the products of the participating suppliers." It reasons that the "ultimate legal question here involved" is whether the payments made are to be classified as price reductions (cognizable under 2(a) and therefore under 2(f)) or promotional payments, that the latter classification is the proper one, and therefore that the purported violations are cognizable if at all only under section 5 of the Federal Trade Commission Act. Several subsidiary arguments are advanced as well, and will be examined below.

Commission counsel respond that sections 2(a) and 2(d) are not mutually exclusive, that in fact they overlap in such a manner as to bring the payments here under the prohibition of both sections. There is some support in the commentators and case law for this position, see Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act 126 (2d ed. 1959); *cf. Elizabeth Arden Sales Corp,* v. *Gus Blass Co.,* 8 Cir., 1945, 150 F.2d 988, 990, 993, *cert. denied,* 326 U.S. 773; *Sun Cosmetics Shoppe* v. *Elizabeth Arden Sales Corp.,* S.D. N.Y., 1949, 82 F. Supp. 687, 688, *rev'd on other grounds,* 2 Cir., 1949, 178 F.2d 150; Conference Report, H.R. Rep. No. 2951, 74th Cong., 2d Sess. at 5.

However, it is not necessary that that question be decided here. We agree with the Commission that a multipartite transaction may in its separate parts violate separate prohibitions of the Robinson-Patman Act. So here. The Commission found that the first $350 payment by each supplier constituted a true promotional payment for which it re-

ceived value in Meyer's promotional services rendered and that the balance of each payment, tied as it was to the volume of goods sold and ranging in amount up to one-third of the regular price to Meyer of those goods, constituted a distinct price discrimination, cognizable under section 2(a). We cannot agree with Meyer that the Commission made this classification "arbitrarily." While it claims that the Commission erred in finding that all participating suppliers paid a flat rate of $350 per coupon book page, it does concede that a very substantial percentage of suppliers paid this or some similar flat rate. And while it is correct in asserting that services rendered need not be shown precisely to equal promotional payments received, see *Giant Foods, Inc.*, 1961, 58 F.T.C. 977, 1010; *Lever Bros.*, 1953, 50 F.T.C. 494, 511, the relationship between payments received and promotional services rendered cannot be unreasonable, see *Giant Foods, Inc., supra.* Here the payments received from Tri-Valley in 1957 exceeded $350 by $4,814 (20,750 coupons redeemed in merchandise at $.232 per coupon), from Idaho Canning in 1957 by $2,585 (21,367 coupons redeemed at $.121), from Cannon Mills in 1956 by about $400, and from Burlington Industries in 1957 and 1958 by a total of about $2,800. In view of such substantial disparities between receipts and proved allocable expenses, we think the Commission correctly decided that these excesses were "outright price concessions" and, since the amounts were directly related to and dependent upon the amount of goods purchased and resold by Meyer, price concessions cognizable under section 2(a) rather than under section 5 of the Federal Trade Commission Act. *Cf. National Tea Co.*, 1950, 46 F.T.C. 829, *order modified*, 1951, 47 F.T.C. 1314.

But, says Meyer, the Commission itself has determined, in proceedings against these suppliers, that some of the payments we consider here were promotional, not price concessions. This contention has no substance. We cannot concern ourselves with questions of Commission strategy or Commission decisions as to whom to prosecute and for what acts. Even a successfully completed proceeding

against a supplier for a 2(d) violation would not necessarily foreclose a contemporaneous or subsequent action against an inducing buyer for a 2(a)-2(f) violation where the payments involved violate both sections.

III. Does Section 2(d) of the Clayton Act Require a Seller to Offer Proportionally Equal Benefits to Its Customers at Different Fuctional Levels?

This is the second "threshold question" asserted by Meyer. The Commission concedes that, to sustain the position taken by it in its opinion, we would have to "reconsider" our decision in *Tri-Valley Packing Ass'n, supra,* where we held, on facts essentially identical with those produced here, that "no section 2(d) violation was shown as to the wholesale operation of Hudson House, because that operation was not in functional competition with Meyer . . .", *id.* at 710. However, it urges us to overrule *Tri-Valley* because, it says, the issue was not fully briefed or argued there, the result was plainly contrary to the language of the Clayton Act and was other than that intended by Congress when it passed the Robinson-Patman Act, and the effect of the case was to immunize a practice intended to be stamped out by that legislation, specifically, the bringing to bear of the economic power of the chains upon suppliers to wring from them prices lower than smaller and less powerful unorganized retailers can extract.

But the issue was considered and considered at length, as a reading of that opinion demonstrates, the "intent" of Congress is not as clear as respondent asserts, and no concrete showing of any increase in abuse by large buyers of their inherent power has been made here. Consequently, we are not inclined after so short a time to re-examine that decision, and adhere to the result reached there.

IV. Did Meyer Know or Have Reason to Know That the Concessions It Induced Were Discriminatory and Unlawful?

The Commission found that Meyer knew or had reason to know that the payments it received were unlawful. That is one of the elements of proof required by section 2(f) and given content by *Automatic Canteen Co.* v. *FTC*, 1953, 346 U.S. 61, 79-81. The Court also held that the ordinary elements of a section 2(a) case must be shown. As explained below, we think the 2(a) elements have been adequately proved, and that the only serious question is as to Meyer's knowledge. That, too, we resolve in the Commission's favor.

A. *The necessity of "pressure" or coercion.*

Meyer seems to take the position that the Commission must establish that the buyer exerted "pressure", see *Automatic Canteen, supra,* at 79, amounting to outright extortion, conceding that in that case the coercion would render the buyer's claimed lack of knowledge culpable, see *American News Co.* v. *FTC*, 2 Cir., 1962, 300 F.2d 104, 107. We think that *Automatic Canteen* does not go so far.

First, we do not understand the Court to have gone beyond the simple statutory requirement of "'inducing" (and clearly petitioner "induced" the payments it received here); we take its words as being more of description that of measurement. Second, "pressure" may be brought to bear in a variety of ways, overt and covert, and petitioner here obviously applied some pressure. This, the fact of Meyer's self-professed market power, and the Commission's superior fact-finding position are sufficient to persuade us not to declare groundless its finding that, whatever may be the degree of "pressure" necessary to sustain

a 2(f) violation, that pressure existed and was successfully applied.[12]

B. *The effect of quantity differences.*

Next, Meyer points to *Automatic Canteen's* requirement that where the quantities sold to the favored and non-favored buyers are not the "same"—which we interpret as meaning substantially the same—the Commission must only show that such differences could not give rise to "sufficient [cost] savings . . . to justify the price differential" and that the buyer should have so known. Meyer insists that the quantity differentials are too great here to permit the Commission's inference that Meyer had reason to know that the differentials could not be cost-justified, and therefore that Count I of the complaint must fall.

Those quantity differences were indeed large; large enough, we assume, to cast on the Commission the burden of showing that petitioner knew or should have known that they still could not be cost-justified. Was that burden carried here? We think it was. The Commission relied on several factors in reaching its conclusion that Meyer

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[12] We need not finally decide here whether actual coercion is necessary to establish the prima facie case, nor do we intimate any view on the result should such overt coercion not be shown.

We do note, however, that the Congress was aware at the time of passage of the Robinson-Patman Act that "it is the manufacturer's recognition that the chain, with its tremendous purchasing and distributing power, may do those things ["buy the goods elsewhere, proceed to manufacture its own, or conduct its stores so as to discourage therein the sale of the recalcitrant manufacturer's goods"] and not the 'threat' of the chain to do them that is the real inducement for granting the special concession." *Final Report on the Chain-Store Investigation,* S. Doc. No. 4, 74th Cong., 1st Sess., p. 49 (1934).

As to violations of § 5 of the Federal Trade Commission Act, no showing of "coercion" is necessary. *R. H. Macy & Co.* v. *FTC,* 2 Cir., 1964, 326 F. 2d 445, 447.

had reason to believe[13] that its suppliers could have no cost justification defense. First, none of the suppliers involved grant quantity discounts. Second, Meyer itself pays the going price during the other eleven months of the year. From this the Commission infers, and fairly, that no measurable cost savings are produced by petitioner's somewhat larger sales and related purchases during the one-month promotion.[14] It buttresses that conclusion by a similar inference drawn from the fact that, during those eleven months, Meyer's sizeable purchases and its competitors' substantially smaller purchases are made at the same price. Third, the price concessions Meyer obtained from Idaho Canning and Tri-Valley amounted to a full third of the regular price. This, with and particularly against the background of the other two factors, led the Commission to the conclusion that petitioner "should have known" something was amiss. We cannot say that inference is unwarranted. That the Commission did not prove the costs of the suppliers is immaterial. Cost surveys are expensive and labyrinthine proceedings whose results are often dependent upon the cost accounting theory used. To require them in all proceedings, even against buyers, would too often be an exercise in futility. At least where the facts and the inferences to be drawn are as clear as they are on this point, we think the method of proof adopted by the Commission here is appropriate to its end, that of showing that the buyer "is not an *unsuspecting recipient* of

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[13] The inquiry here was devoted to ascertaining this fact, not to whether cost justification did or did not exist in fact. No cost studies were introduced by either party.

[14] Meyer suggests but failed to prove that its sales during the balance of the year were significantly lower. Such a failure to introduce evidence within its possession probably strengthens and certainly cannot weaken the Commission's conclusion. See *Mammoth Oil Co.* v. *United States*, 1927, 275 U.S. 13, 52; *cf. Vanity Fair Paper Mills, Inc.* v. *FTC*, 2 Cir., 1962, 311 F. 2d 480, 485-86; 2 *Wigmore, Evidence*, p. 164 (3d ed. 1940).

prohibited discriminations," *Automatic Canteen, supra,* at 81. (Emphasis added.)

Obedient to the command of *Automatic Canteen,* the Commission also inquired into possible cost differences to the seller in "sale or delivery," *id.* at 80. However, in finding that there were no such savings, it relied only on (1) testimony of Meyer's employees to the effect that the increased purchases for the promotion resulted in no changes in Meyer's costs or procedures which might provide cost savings for the suppliers and (2) testimony of a supplier's employee which we think unsatisfactory. Meyer attacks the sufficiency of this evidence, pointing to other evidence in the record which does tend to show that its suppliers' methods of sale and intensity of sales effort differed as between Meyer's regular purchases and special promotion purchases. But we believe that the Commission could find, from the *elements* of the testimony referred to above, that Meyer continued for the most part to purchase in usual method, on its usual terms, and that such differences as might have existed were inconsequential.

In summary, we consider that the evidence which supports the Commission's finding that Meyer had reason to believe that the discriminatory terms and prices it received were not cost-justified is weak but not insufficient. This conclusion is buttressed by the fact that *Automatic Canteen* itself pointed out that "the showing of knowledge . . . will depend to some extent on the size of the discrepancy between cost differential and price differential . . . . A showing that the cost differences are very small compared with the price differential should be sufficient." *Id.* at 80. Here the Commission had before it evidence from which it could infer that manufacturing, selling and delivery cost savings were negligible. The price differential amounted to as much as one-third of the regular price. That, in the circumstances of this case, is enough to satisfy *Automatic Canteen's* requirement of a cost/price comparison.

C. *Competitive injury.*

Meyer also questions the reasonableness of the Commission's finding of competitive injury. It cites *American Oil Co.* v. *FTC*, 7 Cir., 1963, 325 F.2d 101, 106, *cert. denied*, 377 U.S. 954 to support its conclusion and claims that the Commission's dismissal of a related proceeding, *In re Cannon Mills Co.*, 1964, 3 CCH Trade Reg. Rep. ¶ 16,878, on this ground constitutes an "acknowledge[ment] that the nature of the concessions received by Fred Meyer for the coupon promotions were not such as to create a reasonable probability of substantial injury to competition within the meaning of section 2(a)."

But *American Oil* is not such substantial support as Meyer thinks. There a section 2(a) charge grew out of a retail gasoline price war, during the course of which American supplied its dealers in the battle zone at lesser prices than those it charged elsewhere. The conflict raged for only 17 days and every station in the area participated. On these facts the court held that only slight and non-recurring injury below the statutory level of notice took place and that it would have taken place whether or not American had lowered its own prices. The case is obviously different where the discrimination recurs regularly and has a substantial impact upon competition. This is the situation here. We think this case is closer to those systematic and permanent discriminatory pricing systems held invalid in such cases as *FTC* v. *Morton Salt Co.*, 1948, 334 U.S. 37 (discriminatory volume discounts) and *Corn Prods. Ref. Co.* v. *FTC*, 1945, 324 U.S. 726 (systematic discrimination based on "phantom" freight charges and other factors) than to the one disclosed by *American Oil*, and so affirmed the Commission's conclusion.

D. *The duty of inquiry.*

The Commission held that "a buyer who initiates a promotional service and induces his suppliers to pay him for

performing it has possessed himself of 'information sufficient to put upon it the duty of making inquiry to ascertain whether the suppliers were making such payments available on proportionally equal terms to [his] competitors,' " relying on, inter alia, *Giant Foods, Inc.* v. *FTC*, D.C. Cir., 1962, 307 F.2d 184, 187, *cert. denied*, 1963, 372 U.S. 910. The consequence of such a rule is that where sufficient facts exist, the buyer has that knowledge which section 2(f)—and F.T.C. Act § 5, under the general assimilation of Robinson-Patman standards of liability and proof—requires. Meyer attacks that holding on a variety of grounds.

First, it says, that rule is applicable only where the buyer's receipt of payments is "culpable," and cites a number of cases[15] for the proposition that "there is a presumption that men obey the law." But knowledge of probable illegality is equivalent to "culpability", *American Motor Specialties, Inc.* v. *FTC*, 2 Cir., 1960, 278 F.2d 225, *cert. denied*, 364 U.S. 884; *cf. Giant Foods, Inc., supra*, and Meyer had knowledge of at least sufficient facts to create a reasonable suspicion that the payments it received were probably illegal. Hence the "presumption" whose benefit Meyer claims cannot apply. Rather, the duty to inquire arises. *Giant Foods, Inc.* v. *FTC, supra;* see *Grand Union Co.* v. *FTC*, 2 Cir., 1962, 300 F.2d 92, 100; *American News Co.* v. *FTC*, 2 Cir., 1962, 300 F.2d 104, 110, *cert. denied*, 371 U.S. 824.

Second, Meyer claims error in the stated grounds for the Commission's finding that Meyer must have known the payments it received to be incapable of proportionalization. The Commission here appears to have relied on statements

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[15] *United States* v. *Detroit Lumber & Timber Co.*, 1906, 200 U.S. 321; *Athens Roller Mills, Inc.* v. *Commissioner*, 6 Cir., 1943, 136 F. 2d 125, 128; *Fidelity & Deposit Co.* v. *Grand Nat'l Bank*, 8 Cir., 1934, 69 F. 2d 177, 183; *St. Joseph Stockyard Co.* v. *United States*, 8 Cir., 1911, 187 Fed. 104, 106.

in petitioner's solicitation material requiring that "Offer Must be Exclusive at Fred Meyer During the 4 Week Period" and asserting that its coupon book scheme represented a "unique" promotional device, in reaching its conclusion that the coupon book payments *could not be proportionalized.* It found support for this and for its holding that Meyer must have known that the payments solicited from Phillip Morris were disproportional in *Giant Foods, Inc., supra,* at 187. There an agreement in the buyer's promotional contracts with its sellers that "This contract does not alter or replace currently existing agreements between Giant Food Department Stores and participating manufacturers," was interpreted to mean that "Giant's program was designed to exist independently of and/or coextensively with any of its suppliers' regularly available cooperative advertising programs." [16] While we do not agree that a supplier could never proportionalize benefits to its other customers while participating in a program of the degree of "uniqueness" shown here, we do hold that in the circumstances, the Commission could find that benefits here could not be proportionalized, or at least that Meyer had reason to knew of the high degree of unlikelihood that they could be. As the Commission's opinion points out, Meyer itself, for almost 30 years, has considered a four-week span in September and October to be the most propitious time for a promotion of this nature. Consequently a supplier's agreement with another customer to enter into an identical agreement at another time presum-

[16] Meyer claims that the Commission was not entitled to rely on the material which we have quoted from its solicitations for participation for the reason that "the record . . . contains no explanation of the meaning, purpose, or operation of the language." But *for that very reason* we think the Commission was entitled to rely on the plain meaning of the words. Meyer was in a better position than anyone else to show that the words do not mean what they seem to say. Therefore it should bear the burden of disproof, under balancing of convenience and fairness, see *Automatic Canteen, supra.*

ably would not result in equal benefit to either. And by petitioner's own claim, the coupon book plan assures the supplier of "mass distribution of your product at the lowest possible cost." In the absence of contrary evidence, *cf. R. H. Macy & Co.* v. *FTC*, 2 Cir., 1964, 326 F.2d 445, 450, the Commission was clearly entitled to take Meyer at its word and to draw the obvious inferences.

Third, Meyer argues that the record shows only that it operated an extensive information-gathering system, not that it learned by that system who its competitors in the sale of the goods involved here were nor what prices they actually paid. Therefore, it says, it could not know that it was receiving discriminatory prices, and the whole complaint must fall.

The Commission characterized Meyer's investigative activities as a "vigorous intelligence network," finding that Meyer regularly monitored all grocery retailer advertisements on both a local and national scale, engaged in "comparison shopping" of competitive stores, purchased and tested competing goods, and regularly reviewed price bulletins distributed by suppliers and brokers serving the area.

It must be remembered that the inquiry here is as to what petitioner knew *or had reason to know*. Meyer obviously had a great deal of the trade knowledge referred to in *Automatic Canteen, supra*. It is a fair inference that it was aware that, as several witnesses testified, both wholesalers and retailers in the grocery industry operate on a profit margin approximating 2%, that mark-ups on the goods in question are often lower than the price concessions it received, and that customers can be "switched" from one retailer to another simply by reason of a few cents' difference in price on particular items. Meyer itself carefully required of its special promotion suppliers that "Offer Must Be Exclusive at Fred Meyer During the 4 Week Period."

Against this background the mere fact that the record fails to show exact knowledge by Meyer of the precise identity of each competitor in each particularized kind and grade of goods and of the prices paid by competitors for them cannot avail the petitioner: It had "reason to know." See *Giant Foods, Inc.* v. *FTC, supra; Grand Union Co.* v. *FTC, supra; American News Co.* v. *FTC, supra; cf. Automatic Canteen Co.* v. *FTC, supra,* at 79-80; *Tri-Valley Packing Ass'n* v. *FTC, supra,* 329 F.2d at 708-09.

V. Does Federal Trade Commission Act § 5 Reach Inducement of Discriminatory Promotional Allowances?

We must resolve, for the first time in this circuit, the question whether the Commission may proceed against a buyer under § 5 of the Federal Trade Commission Act for inducing and receiving a discriminatory promotional allowance, a practice not expressly declared unlawful, as to buyers, by the Robinson-Patman Act, nor to sellers where, as here, the discrimination is among purchasers at different functional levels of competition. *Tri-Valley Packing Ass'n* v. *FTC,* 9 Cir., 1964, 329 F.2d 694, 708. The Commission takes the position that it has such power. Meyer disagrees.

This is not an entirely novel question; two other Courts of Appeals have considered similar problems and side with the Commission, see *R. H. Macy & Co.* v. *FTC,* 2 Cir., 1964, 326 F.2d 445; *Giant Foods, Inc.* v. *FTC,* D.C. Cir., 1963, 307 F.2d 184, *cert. denied,* 1963, 372 U.S. 910; *American News Co.* v. *FTC,* 2 Cir., 1962, 300 F.2d 104, *cert. denied,* 371 U.S. 824; *Grand Union Co.* v. *FTC,* 2 Cir., 1962, 300 F.2d 92; see also *FTC* v. *J. Weingarten, Inc.,* 5 Cir., 1964, 336 F.2d 687, 693, *cert. denied,* 1965 .... U.S. ..... No case has rejected the result these circuits have reached. We find the reasoning of those cases persuasive, and adopt it. We therefore sustain the Commission here.

VI. The Commission's Order.

Finally, Meyer challenges both the scope of the resulting order and the fact that it is addressed to the two senior officers of the corporation as well as to the corporation itself.

A. *The Officers.*

According to Meyer, the facts are that Fred G. Meyer, the chairman of the board of directors of Fred Meyer, Inc., owns only a minority of the outstanding shares (38.35%), "has nothing to do with the advertising and sales policies of the corporate petitioner," and "is not even familiar with the operation of the coupon book program." Earle A. Chiles, petitioner's president, concededly is "generally responsible for merchandising operations, but only at a policy-making level," and owns 14.37 percent of the stock. These facts, it claims, are insufficient to support an order running directly to these men as individuals and officers of the corporation.

When these attributes are taken singly, petitioner's position may in some circumstances be correct, see *Ostermoor & Co.* v. *FTC*, 2 Cir., 1927, 16 F.2d 962; *In re Maryland Baking Co.*, 1956, 52 F.T.C. 1679, 1691. But the Commission found that this, a "family" corporation (the individuals and their families own almost all of the corporate stock), was "nothing but the 'alter ego' of those two individual respondents." Moreover, Chiles himself testified that "we set the policies and review the practices." And Meyer was originally responsible for instituting the coupon book promotion. We think that, despite Meyer's denials of knowledge of the operations of the business, the Commission was justified in concluding that "if 'a majority of Portland's 120,000 families' were apprised of the details of these programs, we think it is fair inference that the Chairman of the Board also knew about them," [r. 138.] and in joining both as respondents. See *Mandel Bros., Inc.*

v. *FTC*, 7 Cir., 1958, 254 F.2d 18, 22, *rev'd on other grounds*, 1959, 359 U.S. 385; *cf. Western Fruit Growers Sales Co.* v. *FTC*, 9 Cir., 1963, 322 F.2d 67, 69-70, *cert. denied*, 376 U.S. 907.

B. *The Scope of the Order.*

The Commission's Final Order commands that the corporate petitioner and its two named officers cease and desist from

> "Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving, or accepting from any seller a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers where respondents are competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price."

This we refer to as the 2(a)-2(f) order. They are further ordered to cease and desist from

> "Inducing and receiving anything of any value from any supplier as compensation or in consideration for services or facilities furnished by or through respondents in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when respondents know or should know that such compensation or consideration is not being affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondents in the sale and distribution of such supplier's products, including other customers who resell to purchasers who compete with respondents in the resale of such supplier's products."

This we refer to as the § 5 order. Meyer attacks both orders on the grounds that they bear no reasonable relationship to the practices found to be unlawful and that they fail to mention or limit themselves to the coupon book promotion. Moreover, it says, the 2(a)-2(f) order is too broad in that it is not confined to the narrow product categories in suit, and because (as we make out the argument) Meyer might not know that products of like grade and quality being sold in competing outlets were sold to those outlets by its own seller. The section 5 order is claimed to be improper because it is not limited to the specific unlawful practices found here and because it applies to "other customers who resell to purchasers who compete with respondents," *i.e.*, those wholesalers whom we held to be not under the protection of section 2(d) in *Tri-Valley Packing Ass'n, supra.*[17]

Under what is sometimes called the Clayton Finality Act, adopted in 1959, 15 U.S.C. § 21, the Commission's order, when it becomes final, subjects respondents to a $5,000 penalty for each violation, and, where the violation is continuing, to $5,000 per day penalty while it continues. This, we think, requires that Commission orders be more carefully framed than formerly, and that they no longer be a mere command to obey the statute. This, we think, is the effect of Mr. Justice Brennan's caveat in *FTC* v. *Henry Broch & Co.*, 1962, 368 U.S. 360, at 367-68. There he said:

> "We do not wish to be understood, however, as holding that the generalized language of paragraph (2) would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed

[17] Meyer attacks various isolated phrases of this order as well, but an examination of the language to which it objects reveals that such language, though included in the Hearing Examiner's proposed order, was not included in the Commission's final order quoted above.

by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application."

In *Swanee Paper Corp.* v. *FTC*, 2 Cir., 1961, 291 F.2d 833, 837-38, *cert. denied*, 1962, 368 U.S. 987, a § 2(d) case, the court said:

> "Administrative agencies have wide discretion in framing their orders and are empowered to enjoin other related unlawful acts which may occur in the future . . . but there must be some relation between the facts found and the breadth of the order . . . . Moreover, the order is not even limited to related activities but enjoins Swanee from violating Section 2(d) in the very words of the statute . . . . Moreover, the order as written is so broad that, under the new enforcement provisions of the Clayton Act (15 U.S.C.A. § 21), the duty of enforcing the prohibitions of Section 2(d) as to Swanee is shifted from the Commission to the federal courts, which may in the future be forced to decide the very issues that Congress has entrusted the Commission to determine . . . . [W]e therefore hold that the order should be limited to the particular practice found to violate the statute."

The court directed, under its rule 13(l), that the Commission prepare an order in conformity with the court's opinion. A similar result was reached in *Grand Union Co.* v. *FTC*, 2 Cir., 1962, 300 F.2d 92, 101-2, a § 5 case involving, as this one does, violation of § 2(d), and for similar reasons. To the same effect is *American News Co.* v. *FTC*, 2 Cir., 1962, 300 F.2d 104, 111, also a § 5-§ 2(d) case. See also *Joseph A. Kaplan & Sons, Inc.* v. *FTC*, D.C. Cir., 1965, 347 F.2d 785, 788-91.

We think that the order here is subject to many of the strictures levelled by the courts at the orders involved in the foregoing cases. We reject, however, the contention that the order should be restricted to the specific products involved in the violations proved, or to any specific product. The scheme involved is much broader, and an order can properly be directed against such a scheme or comparable ones. We think that the order goes much beyond that and should be so limited. The 2(a)-2(f) order also seems, on its face, to exclude the normal defenses to a section 2(a) violation charge. This, we think, is improper. The section 5 order covers "processing, handling," not here involved. The language in that order: "including other customers who resell to purchasers who compete with respondent in the resale of such suppliers' products" must be stricken. The order is also overly broad as to the two individuals; it should be limited to activities related to the business of Fred Meyer, Inc.

The Commission knows how to draw narrower orders. (See *The Quaker Oats Co.*, CCH Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 15,858; *Vanity Fair Paper Mills, Inc.*, CCH Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 15,796; *Transogram Co.*, CCH Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 16,080; *All-Luminum Prods., Inc.*, 3 CCH Trade Reg. Rep. ¶ 16,665.) It is the expert body. We leave to it the preparation of an order consistent with this opinion.

The order, when properly modified, will be enforced. The Commission shall prepare a proposed decree, conforming to this opinion, pursuant to our Rule 34, subparagraph 12.

(Filed July 1, 1966)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18,903

FRED MEYER, INC., a corporation, and FRED G. MEYER and EARLE A. CHILES, individually and as officers of said corporation, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Final Decree

Petitioners herein having filed in this Court on September 17, 1963, a petition to review and set aside an order to cease and desist issued against them on July 9, 1963, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Fred Meyer, Inc., a corporation, and Fred G. Meyer and Earle A. Chiles, individually and as officers of said corporation, Docket No. 7492," and the matter having been heard by this Court on the record and briefs on June 9, 1965, and this Court having rendered its decision on March 18, 1966,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist be, and it hereby is, modified to read as follows:

IT IS ORDERED that respondent Fred Meyer, Inc., a corporation, its officers, agents, representatives and employees, and Fred G. Meyer and Earle A. Chiles, individually and as officers of and in connection with activities related to the business of respondent Fred Meyer, Inc., in connection with the offering to purchase or purchase by or on behalf of respondent Fred Meyer, Inc., in commerce, as "commerce" is defined in the amended Clayton Act, of products for resale in outlets operated by respondent Fred Meyer, Inc., do forthwith cease and desist from:

Knowingly inducing, or knowingly receiving or accepting, in connection with any promotional scheme consisting of distribution of coupons to and return of coupons by consumers in connection with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable scheme, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondents know or should know is:

(a) below the net price at which such products of like grade and quality are being sold by such seller to any other purchaser with whom respondent Fred Meyer, Inc., competes, or with whose customer or customers said respondent competes and

(b) not a price differential which makes only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which products are sold and delivered by such seller and

(c) not a price change in response to changing conditions affecting the market for or marketability of such products, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned and

(d) not a price made in good faith to meet an equally low price of a competitor of the seller.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account all discounts, rebates, allowances, deductions, or other

terms and conditions of sale by which net prices are effected.

IT IS FURTHER ORDERED that respondent Fred Meyer, Inc., a corporation, its officers, agents, representatives and employees, and Fred G. Meyer and Earle A. Chiles, individually and as officers of and in connection with activities related to the business of respondent Fred Meyer, Inc., directly or through any corporate or other device in or in connection with any purchase by or on behalf of respondent Fred Meyer, Inc., in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale in outlets operated by respondent Fred Meyer, Inc., do forthwith cease and desist from:

Inducing or receiving anything of any value from any supplier as compensation for or in consideration of advertising, promotion, or display services or facilities furnished by or through Fred Meyer, Inc., in connection with any promotional scheme consisting of distribution of coupons to and return of coupons by consumers in connection with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable program, or in connection with any actual or purported promotion or special sale of particular products to be conducted by or on behalf of respondent Fred Meyer, Inc., when respondents know or should know that such compensation or consideration is not being offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondent Fred Meyer, Inc., in the sale of such supplier's products.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist as so modified be, and

it hereby is, affirmed, and that petitioners be, and they hereby are, ordered to obey and comply with said order as so modified.

GILBERT H. JUTTING
Gilbert H. Jutting

BEN. C. DUNIWAY
Ben. C. Duniway

United States Circuit Judges

ROGER D. FOLEY
Roger D. Foley
United States District Judge

A TRUE COPY:

ATTEST: July 11, 1966,

WILLIAM B. LUCK,
Clerk,

By: WILLIAM E. WILSON
William E. Wilson,
Chief Deputy.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 703

FRED MEYER, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a–32a) is reported at 359 F. 2d 351. The opinion of the Federal Trade Commission (R. 59–142)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1966 (Pet. App. 33a–36a). The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Douglas until October 21, 1966, and the petition was filed on October 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] "R." refers to the two-volume transcript of record in the court of appeals, on file with the Clerk of this Court.

QUESTIONS PRESENTED

The Federal Trade Commission held that petitioner Fred Meyer, Inc., violated Section 2(f) of the Clayton Act (as amended by the Robinson-Patman Act) and Section 5 of the Federal Trade Commission Act upon finding that petitioner knew or should have known that the price concessions and promotional allowances it induced and received from its suppliers were unlawful under Sections 2(a) and 2(d) of the Robinson-Patman Act, respectively. The questions presented are—

(1) Whether the Commission's findings that petitioner knew or should have known that the concessions and allowances it received were unlawful are supported by substantial evidence, as held by the court below.

(2) Whether that part of the cease-and-desist order pertaining to the Section 2(d) violation, as modified by the court below, is properly grounded on and reflective of the Commission's findings.

STATUTES INVOLVED

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in pertinent part as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly re-

ceives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

* * * * *

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

* * * * *

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 5(a) of the Federal Trade Commission Act, as amended by 66 Stat. 632, 15 U.S.C. 45(a), provides in part as follows:

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * * *

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

After extensive proceedings, the Federal Trade Commission found that petitioner Fred Meyer, Inc., and two of its officers (1) violated Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, by knowingly inducing certain suppliers of Meyer to grant it discriminatory prices illegal under Section 2(a) of the Act, and (2) violated Section 5 of the Federal Trade Commission Act by knowingly inducing certain suppliers to grant Meyer promotional allowances illegal under Section 2(d) of the Clayton Act; and entered a cease-and-desist order.

Meyer (hereinafter "petitioner") operates a chain of thirteen retail stores in the Portland, Oregon, area selling groceries, drugs, variety items, and a limited line of clothing. With sales exceeding $40 million in 1957, it was, during the relevant period, the second largest seller of all goods in the area (Pet. App. 3a; R. 60).

Since 1936 petitioner has conducted, through the use of coupon books, a promotional advertising campaign for one month of each year. For each promotion, it prints and distributes a 72-page book, each page of which features a single product and serves as a coupon for the purchase of certain amounts of such product at a specially reduced rate. The campaign involves a large promotion; about 140,000 books

were used in 1957, and about 120,000 in 1958 (Pet. App. 4a; R. 62–64). Petitioner finances the promotion by charging the supplier of each featured product a basic fee of $350. In addition, some of these suppliers give petitioner price reductions based upon volume purchases, replace without charge goods that petitioner has sold at special prices, or redeem coupons at an agreed rate (Pet. App. 4a; R. 64–67).

The evidence considered in the Commission proceedings related to transactions between the petitioner and five of its suppliers, only four of which participated in the coupon-book program. (The four participating suppliers were Burlington Industries, Inc., Cannon Mills Co., Tri-Valley Packing Ass'n, and the Idaho Canning Co.; Phillip Morris, Inc., was the non-participating supplier.) The Commission found that the first $350 paid to petitioner by each of the four participating suppliers was a promotional allowance within the meaning of Section 2(d), and that the additional benefits granted by these suppliers[2] in connection with the program were discriminatory price concessions within the purview of Section 2(a). It found

[2] A subsequent, separate proceeding against Cannon Mills was dismissed by the Commission for failure of proof of potential competitive injury (CCH Trade Reg. Rep., 1963–65 Transfer Binder ¶ 16,878). The hearing examiner, it should be noted, would have dismissed the case on the different ground that Cannon Mills could have cost justified the price concessions (CCH Trade Reg. Rep., 1963–65 Transfer Binder ¶ 16,682). The Commission thus did not rely in the court of appeals on the transactions between that supplier and petitioner as part of its case relating to the price-discrimination charge against petitioner. See Pet. App. 9a, n. 5.

that both Sections 2(d) and 2(a) had been violated since these suppliers had not granted the same promotional allowances and price concessions to other buyers of the same products who resold them in the Portland area; and that Section 2(d) had also been violated by Phillip Morris's granting petitioner promotional allowances, not connected with the coupon-book program, which were not available to two other buyers reselling in the same area (Pet. App. 6a–14a; R. 61–76; 100–103).

The buyers disfavored by Tri-Valley Packing and Idaho Canning and one of the two buyers disfavored by Phillip Morris were wholesalers who resold to retailers competing with petitioner. The Commission ruled that these disfavored wholesalers were protected under Section 2(d) from discriminatory promotional allowances in favor of petitioner even though petitioner was not a wholesaler but a direct-buying retailer (R. 85–93).

The Commission further found that petitioner (and its officers) had sufficient knowledge of the facts making illegal the discriminatory prices and payments it received to satisfy the knowledge requirements of Sections 2(f) and 5, including awareness that the price concessions could not be cost-justified by the suppliers despite the large quantities of goods purchased by petitioner (Pet. App. 20a–22a). The Commission relied on evidence showing that (1) none of the suppliers grants quantity discounts and petitioner itself pays the going amount except during the one-month period of the promotion, even though it buys substantially more than

its competitors; (2) the price concessions petitioner received from two of its suppliers, Tri-Valley and Idaho Canning, amounted to one-third of the price regularly charged by those suppliers; and (3) the cost savings resulting from differences in methods of sale or delivery were inconsequential (Pet. App. 20a–22a). The Commission also found that petitioner knew or should have known that the suppliers had not made the promotional allowances available to petitioner's competitors on proportionally equal terms. In this regard, it relied on evidence showing that (1) petitioner systematically gathered extensive information about its competitors' marketing activities (Pet. App. 26a), and (2) petitioner exerted pressure to induce its suppliers to grant the promotional allowances and to grant them exclusively to petitioner for the duration of the promotion (Pet. App. 19a–20a, 26a). The Commission reasoned that a buyer initiating a promotional program and inducing his suppliers to pay for participation in it possesses information sufficient to place upon the buyer the duty of inquiring whether the suppliers were making the allowances proportionally available to the buyer's competitors (Pet. App. 23a–24a). Thus, the Commission concluded, petitioner at least "had reason to know" that the concessions and allowances were discriminatory, and this was sufficient to support the findings of violation under Sections 2(f) and 5 (Pet. App. 26a–27a).

The Commission issued a two-part cease-and-desist order, which enjoined petitioner from knowingly in-

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ducing or receiving (1) any discriminatory price concessions (the Sections 2(a)–2(f) part), and (2) any discriminatory promotional allowances (the Sections 2(d)–5 part).

The Court of Appeals for the Ninth Circuit upheld the Commission's findings that petitioner had induced (1) price concessions which were illegal because they discriminated against other retail buyers and wholesale buyers, and (2) promotional allowances which were illegal because they were not made available to competing retail buyers. The court, however, reversed the Commission's ruling that petitioner acted illegally in inducing promotional allowances that were not made available to wholesale buyers who resell to retailers with whom petitioner competes (Pet. App. 18a).[3] It considered at length and specifically upheld the Commission's finding that petitioner knew or should have known of the unlawfulness of the payments it received (Pet. App. 19a–27a). In modifying the Commission's order, the court below limited the scope of the Sections 2(a)–2(f) part to coupon promotions or "any comparable scheme" (Pet. App. 34a), but left the scope of the Sections 2(d)–5 part substantially unchanged, although modifying the language somewhat. (Compare Pet. App. 35a and R. 57–58.)

[3] In No. 789, This Term, pending on petition for certiorari, the Commission is seeking review of this part of the decision by the court below. In addition, the Commission in that petition seeks review of one modification of the Commission's order of the court below which the Commission considers erroneous (see Pet. No. 789, 2, 14–15), but only if the Court grants review of the second question, also relating to the scope of the order, presented by petitioner in the instant case.

ARGUMENT

1. The court of appeals upheld, as supported by substantial evidence, the Commission's finding that petitioner (1) knowingly induced three of its suppliers, Burlington Industries, Tri-Valley Packing, and Idaho Canning, to give petitioner price concessions not made available to its competitors and therefore discriminatory and unlawful under Section 2(a) of the Robinson-Patman Act, and (2) knowingly induced three of its suppliers, Burlington Industries, Cannon Mills, and Phillip Morris, to give petitioner promotional allowances not made available to its competitors and therefore discriminatory and unlawful under Section 2(d) of the Act. Petitioner shows neither that the court of appeals misapprehended the proper standard for determining whether the Commission findings were supported by substantial evidence nor that the court misapplied that standard. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. There is thus no occasion for further review of the essentially factual issues here involved.

Petitioner argues that it could not have known that Burlington Mills provided it with illegal price discounts because petitioner bought in larger quantities from Burlington than did petitioner's competitors. Petitioner would naturally assume, so the argument goes, that the discounts that Burlington provided reflected the cost savings resulting from selling in volume and thus were lawful, as cost-justified, under Section 2(a). Both the court of appeals and the Commission properly rejected this

argument, however, by pointing out that petitioner knew that none of the suppliers granted quantity discounts and that petitioner itself paid the going rate eleven months of the year. Therefore, the evidence showed that petitioner at least had reason to know that the price discounts provided were not cost-justified.[4]

Petitioner also argues that the price discounts made available by Tri-Valley and Idaho Canning were not illegal under Section 2(a) of the Act, and, thus, in inducing these discounts, petitioner did not knowingly induce discriminatory price concessions. Petitioner bases this argument upon the theory that these suppliers sold at higher prices to wholesalers than to petitioner, but that since petitioner was a direct-buying *retailer*, it did not compete directly with such wholesalers. Petitioner's argument, in short, is simply that Section 2(a) forbids price discrimination only when it occurs between two firms competing at the same functional level. There is no merit to this contention, however, for it is well settled that a seller violates Section 2(a) when it discriminates against a wholesale buyer whose retail customers compete with the favored direct-buying retailer. *E.g., Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37. The Commission found that

[4] In addition, petitioner initiated and was the moving force behind the promotion (*supra*, pp. 4–5). Under such circumstances it had at least some duty to inquire about whether the concessions and allowances it induced are unlawful, and it can properly be charged with the knowledge which would have resulted from such an inquiry. *E.g., Giant Food Inc.* v. *Federal Trade Commission*, 307 F. 2d 184, 187 (C.A.D.C.), certiorari denied, 372 U.S. 910.

here the retail customers of the disfavored wholesalers competed with petitioner (R. 93–95).[5]

Finally, petitioner contends that one of the three suppliers that the court of appeals held provided it with illegal promotional allowances did not in fact do so. It claims that the allowances received from Cannon Mills were not unlawful under Section 2(d) because the discrimination did not injure competition, and, in any event, was cost-justified.[6] Petitioner's argument in this regard is without merit, however, for cost justification does not provide a defense to a Section 2(d) charge, and injury to competition is not a requirement for a Section 2(d) violation. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 65.

Contrary to petitioner's assertions, the Commission and the court of appeals here adhered to and properly applied the teachings of this Court's decision in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61. In essence, *Automatic Canteen* held

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[5] Petitioner also challenges the Commission's determination that the price concessions granted by the three suppliers were likely to injure competition. The Commission found, however, that competition in the food industry is so keen that price differentials of as little as a few cents would shift some customers from one store to another, that the price concessions enabled petitioner to resell some of the goods at prices lower than the wholesalers *paid*, and that two of the items involved were the "fastest moving" in their respective lines and thus particularly significant in influencing consumer choices (Pet. App. 26a). These findings provide a sufficient basis for the Commission's determination. See *Federal Trade Commission* v. *Morton Salt Co.*, 344 U.S. 37; *Moog Industries* v. *Federal Trade Commission*, 238 F. 2d 43 (C.A. 8).

[6] See note 2, *supra*.

only that, in a proceeding in which a violation of Section 2(f) of the Robinson-Patman Act is charged, the burden is on the Commission to introduce evidence, as an initial matter, showing that the buyer knew that the price he induced was discriminatory and not otherwise justified, and that a mere showing that the buyer knew that the prices he was charged were lower than those paid by other purchasers is, standing alone, insufficient to carry this burden. Here the court below painstakingly considered the effect of *Automatic Canteen* under the instant circumstances (Pet. App. 19a–27a), and concluded that the evidence introduced provided a sufficient basis for the Commission's finding that petitioner knew or had reason to know that the concessions and allowances it received were unlawful. Petitioner actually is complaining that the evidence on the question of knowledge is not sufficiently substantial, not that the court below failed to follow *Automatic Canteen*. As discussed at length previously (*supra*, pp. 9–11), the factors relied on by the Commission and discussed by the court below (Pet. App. 21a), upon any fair consideration, show that petitioner had reason to know that the concessions it received were not cost-justified, and that it was "not an unsuspecting recipient of prohibited discriminations" (*Automatic Canteen Co., supra*, at 81). This is all that *Automatic Canteen* requires.

Petitioner not only mischaracterizes this Court's holding in *Automatic Canteen*, but also misconstrues the decision of the court below. Whatever its views on certain aspects of the evidence, the court below

held that substantial evidence supported the Commission's finding that petitioner knew or had reason to know that the concessions and allowances which it induced were unlawful (Pet. App. 26a–27a). In sum, the decision below follows prior cases in construing and applying *Automatic Canteen*, gives the "knowingly" requirement of Section 2(f) a balanced and sensible construction, and requires only that buyers make a reasonable effort to determine whether discriminatory concessions and allowances induced are cost-justified or otherwise not unlawful. Rather than presenting a conflict with *Automatic Canteen*, the analysis and holding of the court below are wholly consistent with the principles laid down by this Court in that case.

2. Petitioner also complains that a portion of the cease-and-desist order, as modified by the court below, is too broad insofar as it forbids petitioner to induce illegal promotional payments, not only in connection with any coupon promotion scheme, but also in connection with "any actual or purported promotion or special sale of particular products" (Pet. App. 35a). While this part of the order is broader than the part forbidding the inducing of illegal price discriminations, the evidence supporting it has wider scope. The illegal price discriminations here at issue were basically related to the coupon promotion scheme. But, certain of the discriminatory promotional allowances provided to petitioner—those involving Phillip Morris—had nothing to do with coupon promotions, but instead concerned various other types of promotional arrangements. Because the Section

2(d) violations were more extensive, the remedial order needed to be broader.

In any event, review of this part of the instant order, as modified and approved by the court below, is not warranted. In recent years this Court has frequently stressed the broad discretion which exists in framing and formulating orders where Robinson-Patman Act violations have been found. For example, in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473, the Court stated:

> In carrying out this function [to prevent illegal practices in the future] the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. * * * Moreover, "[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed. *Jacob Siegel Co.* v. *Federal Trade Comm'n*, 327 U.S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.*, at 613.

See also *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428–429; *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392–393.[7]

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[7] Nothing in this Court's decision in *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, relied on by peti-

Here, particularly in light of the violations involving Phillip Morris (*supra*, p. 6), this part of the order is not so sweeping as to constitute an abuse of discretion; nor can the terms of the order be said to have "no reasonable relation to the unlawful practices found to exist."[8]

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tioner, is at all contrary to these decisions. In fact, in *Broch*, 368 U.S. at 364, the Court specifically relied on *Jacob Siegel Co.*, *supra*. Finding no merit in the argument that the Commission's order was too sweeping in its application to sales from *all* sellers to *all* buyers, the Court referred to the Commission's "wide discretion" in shaping its orders, and stated: "We cannot say that the Commission exceeded its discretion in banning repetitions of Broch's violation in connection with transactions involving *any* seller and buyer * * *" (368 U.S. at 364). Both the Commission and the court of appeals were quite aware of "the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application" (*id.* at 368), as required by this Court's opinion in *Broch*, and acted in conformity therewith in shaping and approving that part of the order here questioned. In contrast to *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F. 2d 833 (C.A. 2), certiorari denied, 368 U.S. 987, this is not a case where there is no "relation between the facts found and the breadth of the order" (291 F. 2d at 837); nor is petitioner here enjoined "from violating Section 2(d) in the very words of the statute" (*id.* at 838); compare *Joseph A. Kaplan & Sons, Inc.* v. *Federal Trade Commission*, 347 F. 2d 785, 789 (C.A.D.C.).

[8] This is not a situation in which the court of appeals simply approved the Commission's order *in toto* and reviewed the terms of that order only in a perfunctory manner. Indeed, the court below scrutinized the Commission's order carefully and modified it in certain significant respects (Pet. App. 28a–32a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

W. RICHARD HADDAD,
Attorney.

JAMES MCI. HENDERSON,
General Counsel,

J. B. TRULY,
Assistant General Counsel,
Federal Trade Commission.

DECEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 703

FRED MEYER, INC., a corporation, and FRED G. MEYER and EARLE A. CHILES, individually and as officers of said corporation, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

EDWARD F. HOWREY
1707 H Street, Northwest
Washington, D. C. 20006

GEORGE W. MEAD
1211 Public Service Building
Portland, Oregon

Attorneys for Petitioners

Of Counsel:

HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, Northwest
Washington, D. C. 20006

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FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners ("Meyer" hereinafter) pray that this Court grant rehearing of its order of February 13, 1967, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in this case as prayed for in the petition filed herein on October 19, 1966, but limited to Question 1 presented by said petition.

Reasons for Granting Rehearing And Issuing the Writ

In its petition for a writ of certiorari, Meyer sought review of the holding of the court of appeals that it *knowingly* induced discriminations in prices and promotional allowances on the ground that the Federal Trade Commission and the court of appeals disregarded entirely the

standards of proof enunciated by this Court in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61 (1953).[1] By cross petition (No. 789, this Term) the Commission sought review of the court of appeals' holding that it is not a violation of Section 2(d) of the Robinson-Patman Act for a supplier to grant to a direct-buying retailer promotional allowances which are not made available to a wholesaler. On February 13, 1967, this Court granted certiorari on the question presented by the Commission's cross-petition but denied certiorari on the question presented by Meyer. In granting certiorari to the Commission and denying it to Meyer we believe the Court overlooked or failed to understand the real and ultimate issue in this case.

The question whether Meyer's suppliers violated the Robinson-Patman Act was only the first half of the Commission's burden of proof. Meyer was charged with *knowingly inducing such violations.* Since the court of appeals found no violation in the suppliers' granting of allowances to Meyer and not to wholesalers, it did not reach the question of whether a violation was knowingly induced. If this Court should disagree with the court of appeals and hold that a violation of Section 2(d) can be predicated upon disproportionate allowances as between wholesalers and retailers, the ultimate question of whether Meyer possessed knowledge of illegality must still be decided before the court of appeals' order can be modified. It is this very question, and the standard of proof applicable thereto, that was presented by Meyer's petition for a writ of certiorari. Since the question of guilty knowledge must be reached if the court of appeals' holding on the retailer-wholesaler question is reversed, we respectfully suggest that evenhanded and efficient administration of justice requires granting of certiorari on the first question presented by Meyer's petition.

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[1] In its petition, Meyer also presented the question of whether the order entered by the court of appeals is improperly broad. Meyer does not seek rehearing on this order question.

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari, limited to the first question presented, issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

EDWARD F. HOWREY
1707 H Street, Northwest
Washington, D. C. 20006

GEORGE W. MEAD
1211 Public Service Building
Portland, Oregon

Attorneys for Petitioners

Of Counsel:

HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, Northwest
Washington, D. C. 20006

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

EDWARD F. HOWREY
Attorney for Petitioners

Dated: March 6, 1967